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No. 91-314

**IN THE SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1991**

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CHAMP CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, LOCAL 509,

Respondents,

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# RESPONDENT UNIONS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ROBERT M. DOHRMANN, ESQ.
(Counsel of record)
MARGO A. FEINBERG, ESQ.
SCHWARTZ, STEINSAPIR, DOHRMANN & SOMMERS
Attorneys at Law
3580 Wilshire Boulevard, Suite 1820
Los Angeles, California 90010-2594
(213) 487-5700
JORDAN A. ROSSEN
RALPH O. JONES
8000 East Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

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### STATUTES


**National Labor Relations Act:**

29 U.S.C. § 151 et seq. . . . . 3

Respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America - UAW and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America - UAW, Local 509 (hereinafter referred to collectively as "the Union" or "the UAW") respectfully oppose the petition of Champ Corporation for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## I

## STATEMENT OF THE CASE

Petitioner Champ Corporation (hereinafter "Champ" or "the Employer") seeks a writ of *certiorari* to review the decision of the United States Court of Appeals for the Ninth Circuit, reported at 933 F.2d 688, enforcing the Decision and Order of

the National Labor Relations Board (hereinafter "the Board" or "the NLRB") reported at 291 NLRB No. 119. In that decision the NLRB found that Champ had violated the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (hereinafter "the NLRA" or "the Act") and ordered it to provide back pay and reinstatement to the employees it had unlawfully discharged and refused to reinstate and to take other affirmative action to remedy these violations.

The Union Respondents rely on the NLRB's recital of the evidence presented and the proceedings below in its Brief in Opposition to Petition for Writ of Certiorari.

## II

## REASONS FOR DENYING THE PETITION

There are no sound reasons to grant a writ of *certiorari* in this case. Champ's petition raises two issues for review: (1) whether the Board's delay in deciding this case excuses Champ from paying back pay to its employees and (2) whether the Board and the Ninth Circuit properly determined that Champ's unfair labor practices converted the Union's strike into an unfair labor practice strike. Neither warrants extraordinary review via *certiorari*.

The first issue--whether administrative delay is a defense to Champ's back pay obligations--was decided over twenty years ago. NLRB v. J.H. Rutter-Rex Mfg. Co., Inc., 396 U.S. 258 (1969). Champ has not cited Rutter-Rex at any point in its

petition for *certiorari*. Indeed, Champ did not even raise this issue below, either when it originally briefed this case or in its request for reconsideration. Its petition for *certiorari*, which fails to cite the controlling Supreme Court precedent on an issue it never raised below, is simply frivolous.

Champ's second issue--whether Champ's unfair labor practices converted the strike into an unfair labor practice strike--is likewise not worthy of review. As Champ concedes in its petition for *certiorari*, its dispute with the Court of Appeals concerns questions of fact peculiar to this case, rather than any general issues of law. Champ does not, in fact, even claim that the Ninth Circuit's standard for determining how an economic strike may be converted into an unfair

labor practice strike is wrong or inconsistent with the standards applied by any other Circuits.

Instead, Champ's quarrel with the Court of Appeals is over that Court's determination that the Board's finding that the strike was "aggravated or prolonged" by Champ's unfair labor practices is supported by substantial evidence. Supreme Court review of a Court of Appeals' decision on this question is almost never appropriate. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Champ has not shown any reasons why *certiorari* should be granted in this case.

1. **Champ Has Not Raised The Defense of Administrative Delay At Any Time in the Proceedings Below.**

Champ's first argument is that the NLRB's failure to decide this case in a timely fashion excuses it from its obligation to pay back pay to the employees whom it wrongly refused to reinstate. (Petition for Certiorari, pp. 10-14) Champ never raised this issue at any time in the proceedings below. It has not offered any explanation for its failure to do so or even recognized the impropriety of raising an issue for the first time its petition for a writ of *certiorari*.

An issue that has not been raised in the Court below is not properly before this Court, even if presented in the petition for *certiorari*. Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981).

There is no reason to deviate from that rule in this case.

2. **Champ Has Not Presented Any Grounds For Reversing This Court's Decision in *NLRB v. J. H. Rutter-Rex***

Even if Champ had preserved this issue on appeal, it has not presented any reasons for reversing this Court's decision in Rutter-Rex. The Court in Rutter-Rex considered and rejected all of Champ's arguments in terms too clear to be misunderstood:

> Assuming without deciding that the delay in issuing the specification did violate the Board's duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement

of the full back pay remedy was an abuse of the Board's discretion. Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer. In view of "the economic hardship caused by many years of undeservedly substandard earnings," lengthy delays "must render the back pay award a wholly inadequate and unsatisfactory remedy" to the employees for the company's refusal to reinstate them. . . . [T]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees for the benefit of wrongdoing employers.

396 U.S. at 264-65 (citations omitted)

The Court reaffirmed Rutter-Rex in NLRB v. Iron Workers Local 480, 466 U.S. 720, 724-25 (1984). No decision of this Court has suggested at any time in the last twenty years that either Rutter-Rex or Iron Workers Local 480 is no longer good law. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898-99 (1984). Champ, for its part, does not even mention these decisions, let alone explain why this Court should reverse them.

Champ does, however, rely heavily on four Circuit Court decisions to argue that it is entitled to rely on the Board's delay in deciding this case as grounds for refusing to pay back pay to the employees it unlawfully discharged or refused to reinstate. NLRB v. Mountain Country Food Store, Inc., 931 F.2d 21 (8th Cir. 1991);

Texas Petrochemicals Corp. v. NLRB, 923 F.2d 398 (5th Cir. 1991); NLRB v. Brookshire Grocery Co., 919 F.2d 359 (5th Cir. 1991); Emhart Industries, Hartford Division v. NLRB, 907 F.2d 372 (2d Cir. 1991). These cases do not hold this and do not support a petition for *certiorari*.

Of these four cases, three are not even apposite.[1/] As for the fourth case, the Court of Appeals' comments on this issue in that case are at most *obiter*

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[1/] In Country Food Store the Court of Appeals denied enforcement to an NLRB order on the ground that changed circumstances made the Board's order practically meaningless. The Board's order did not provide for back pay. 931 F.2d at 22. In Texas Petrochemicals the Court stayed the Board's order requiring the successor employer to bargain and remanded in order to permit the holding of a representation election. 923 F.2d at 406. In Brookshire Grocery the Court of Appeals denied enforcement of the Board's order on the merits, mentioning the Board's delay in deciding the case only in passing. 919 F.2d at 362-64.

*dicta*, since the Court had already denied enforcement of the Board's order on the ground that it was not supported by substantial evidence. Emhart, 907 F.2d at 376-78. What is more, that dictum has since been rejected by a later decision from the Second Circuit, which expressly rejected the reading of Emhart that Champ is pressing here. NLRB v. Aeronautical Industrial District Lodge No. 91, 934 F.2d 1288 (2d Cir. 1991).[2/]

The Court in Emhart Industries did not offer any reasoned explanation for its refusal to follow Rutter-Rex and Iron

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[2/] The Second Circuit distinguished Emhart by noting that the Court's refusal to enforce the Board's order in Emhart was only justified by the substantial changes in circumstances in the years that the case was pending before the Board. The Second Circuit specifically rejected the argument that administrative delay alone is enough to deny a make-whole remedy to wrongfully terminated employees. Id. at 1299.

Workers Local 480.[3/] The Second Circuit has refused to follow that erroneous holding. There is no conflict between the Circuits on this point.

And even if there were, this would not be an appropriate case in which to resolve that conflict, for the simple reason that Champ never raised this issue below. Even if it had, the Ninth Circuit's refusal to shift the cost of the Board's delay from the employer who violated the Act to the employees it wrongfully discharged and refused to

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[3/] The Emhart Court characterized Rutter-Rex and Iron Workers Local 480 as "the majority view"--an odd choice of words, since the cases that would make up the "minority view" are all decisions of lower courts. Odder yet, it put this statement in the past tense: "the majority view seems to have been that denying enforcement on the ground of delay alone 'punishes employees for the Board's nonfeasance.'" 907 F.2d at 379. The Court of Appeals never explains how "be" became "have been."

rehire was correct. *Certiorari* might have been appropriate in Emhart; it is completely inappropriate here.

In this case, as in Rutter-Rex, the Board's delay in deciding this case has harmed "innocent employees . . . [who] had to live for some years on reduced incomes as a combined result of the delay and the company's illegal failure to reinstate them." 396 U.S. at 265-66. Champ asks this Court to reverse Rutter-Rex in order to add to that injury by denying them back pay altogether. That invitation should be rejected.

3. **There Is No Conflict Between the Circuits In Determining When An Employer's Unfair Labor Practices Convert An Economic Strike Into An Unfair Labor Practice Strike.**

Champ's second ground for seeking *certiorari* is its claim that the Court of Appeals misapplied the law in holding that the Employer's unfair labor practices had converted an economic strike into an unfair labor practice strike. This argument turns out on closer inspection to be all about the Ninth Circuit's review of the Board's factual findings and not at all about the standard it applied to them.

Thus Champ concedes that, while the Court of Appeals' original decision in this case "appeared to create a new standard" (Petition for Certiorari, pp.

14), the Court subsequently amended its decision to clarify the standard that it was applying. Champ does not express any disagreement with the standard set out in the Court's amended decision or with its allocation of the burden of proof.

Instead Champ complains that the Board improperly found that its unfair labor practices had aggravated or prolonged the strike. According to Champ there is no substantial evidence to support this finding. (Petition for Certiorari, pp. 17-18) Even if this were true--which it is not--that would not be grounds for a writ of *certiorari*.

Review of the Board's factual findings is an issue which Congress has left to the Courts of Appeals, not this Court. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951). *Certiorari*

is not appropriate except in the rare instance when the Court of Appeals has either misapprehended or grossly misapplied the Universal Camera standard. Id. at 491.

This is not one of those rare instances. The Ninth Circuit did just what it was required to do under Universal Camera: it reviewed the record as a whole, considered both the evidence supporting and detracting from the Board's finding, and concluded that the Board's decision was supported by substantial evidence. Champ has not shown how the Court has either "misapprehended" or "misapplied" the Universal Camera standard, let alone "grossly."

Furthermore, Champ's arguments would have to be rejected even if the Board's findings on this issue were subject to *de*

*novo* review. The Court of Appeals found abundant evidence that Champ's unfair labor practices aggravated and prolonged the strike, citing (1) Champ's repeated insistence on injecting this issue into negotiations, (2) the unanimous vote taken by employees to remain on strike until all strikers were reinstated and (3) the Union's express refusal to agree to these discharges. Unable to explain away this inconvenient evidence, Champ simply ignores it.

As the Court of Appeals found, employees reacted to Champ's "divide and conquer" tactics by showing increased determination to strike in order to win reinstatement for these wrongfully fired workers, as well as the economic demands that prompted the strike in the first place. The Court weighed this against the

evidence which seemed to detract from this finding--the failure to change the wording of the picket signs and the lack of any formal demand at the bargaining table for the reinstatement of these employees--and found that this evidence did not show that the Board's findings were not supported by substantial evidence. There is no basis for reversal of the Court's careful review of the record evidence.

There is simply nothing in Champ's petition that would warrant grant of a writ of *certiorari* in this case. The petition for writ of *certiorari* should be denied so that this case may be remanded to the Board in order to provide Champ's employees with the remedies they have already waited too long to receive.

## III

## CONCLUSION

For all the reasons set forth above, respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America - UAW and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America - UAW, Local 509 respectfully request that the petition of Champ Corporation for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Ninth Circuit be denied.

DATED: October 17, 1991

Respectfully submitted,

ROBERT M. DOHRMANN
(Counsel of record)
MARGO A. FEINBERG
3580 Wilshire Boulevard
Suite 1820
Los Angeles, CA 90010-2594
(213) 487-5700
SCHWARTZ, STEINSAPIR, DOHRMANN
& SOMMERS
JORDAN A. ROSSEN
RALPH O. JONES
8000 East Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

*PROOF OF SERVICE - F.R.C.P. 5(b)*

*I, Margarita Valdez, the undersigned, certify and declare that I am a citizen of the United States, over the age of eighteen years, employed in the County of Los Angeles, State of California, and not a party to this action. On, October 18, 1991, I served true copies (as indicated below) of* ***RESPONDENT UNIONS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

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Margarita Valdez

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